LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JAN 20 1962
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 626

UNITED STATES OF AMERICA, ex rel., CARTER-SCHNEIDER-NELSON, INC., a corporation,
Appellant,
vs.
JACK T. CAMPBELL, doing business as CAMPBELL CONSTRUCTION AND EQUIPMENT COMPANY, and FIDELITY AND CASUALTY COMPANY OF NEW YORK, a corporation,
Appellees.

UNITED STATES OF AMERICA, ex rel., CARTER-SCHNEIDER-NELSON, INC., a corporation,
Appellant,
vs.
JACK T. CAMPBELL, doing business as CAMPBELL CONSTRUCTION AND EQUIPMENT COMPANY, and PHOENIX ASSURANCE COMPANY OF NEW YORK, a corporation,
Appellees.

Brief of Appellees Jack T. Campbell, Doing Business as Campbell Construction and Equipment Company, and Fidelity and Casualty Company of New York, a Corporation, in Opposition to Petition for Writ of Certiorari

GEORGE H. HAUERKEN
Russ Building
San Francisco, California
Attorney for Jack T. Campbell, etc., and Fidelity and Casualty Company of New York

Of Counsel
THOMAS E. DAVIS
369 Pine Street—Suite 309
San Francisco, California

BORG PRINTING COMPANY OF CALIFORNIA, 180 FIRST STREET, SAN FRANCISCO 5

In the Supreme Court of the United States

OCTOBER TERM, 1961

No.

UNITED STATES OF AMERICA, ex rel. CARTER SCHNEIDER NELSON, INC., a corporation,
Appellant,
vs.
JACK T. CAMPBELL, doing business as CAMPBELL CONSTRUCTION AND EQUIPMENT COMPANY, and FIDELITY AND CASUALTY COMPANY OF NEW YORK, a corporation,
Appellees.

UNITED STATES OF AMERICA, ex rel. CARTER SCHNEIDER-NELSON, INC., a corporation,
Appellant,
vs.
JACK T. CAMPBELL, doing business as CAMPBELL CONSTRUCTION AND EQUIPMENT COMPANY, and PHOENIX ASSURANCE COMPANY OF NEW YORK, a corporation,
Appellees.

Brief of Appellees Jack T. Campbell, Doing Business as Campbell Construction and Equipment Company, and Fidelity and Casualty Company of New York, a Corporation, in Opposition to Petition for Writ of Certiorari

In the separate suit where judgment was entered by the trial court and affirmed by the Court of Appeals in favor of petitioner and against Campbell and Fidelity and Casualty Company of New York, the petitioner prays for a writ of certiorari on the basis that the decision of the Court of Appeals is contrary to decisions in other Circuit Courts of Appeal and cites in support of that statement the case of *United States for the use of Sasi v. Zara* (2nd Cir. 1944), 146 Fed. 2nd 606, 612.

Petitioner contends that a recovery should have been predicated upon the time the equipment was available for use at the Fort Funston job based upon the monthly rental rates for the entire spread of time the equipment was out of appellant's possession rather than for the time that the equipment was actually available for use.

Petitioner was allowed rent for the equipment for the time that it was actually located at Fort Funston and apparently complains because rental was not allowed after the work for which the particular piece of equipment was required was completed and the equipment had been removed from the job by the subcontractor and never returned to the job.

It must be recalled in the present case that the equipment was leased to a subcontractor of the general contractor and that the subcontractor had the right to move the equipment at will from the job to other places and after it was removed from the Fort Funston job, the general contractor had no control over it and no way of knowing whether it had been returned to the lessor or moved to other places with the lessor's consent.

Only two pieces of the rented equipment were used at or located at the Fort Funston job after May 27, 1956. The Court allowed rental on one piece of that equipment until

November 2, 1956 and on the other until January 15, 1957, the dates on which each was removed from the jobsite by the subcontractor.

The time for which the equipment was leased expired on October 20, 1956. No rental had been paid for its use after May 27, 1956.

The work for which each piece of equipment had been employed and had been used was fully completed when such piece was removed from the jobsite and there was no further need or use for it at the jobsite.

In the opinion of the Court of Appeals, contained in the appendix to the petition for writ of certiorari, the Court of Appeals fully answers the contentions of petitioner. (Appendix pages 4 to 8 inclusive)

There is no similarity between the facts in the present case and the facts in the case of *U.S. for the use of Susi Contracting Co. v. Zara Contracting Co.*, 146 Fed. 2nd 606, 612, cited by petitioner.

In that case, the general contractor breached the subcontract and took possession of and utilized the equipment furnished by the subcontractor at the contract site. The Court held the general contractor and his surety were to be charged rental for the time of retention of the equipment and not merely for the hours of use.

In the instant case, there was no retention of the equipment by the general contractor at any time. While it was at the site of the work it was in the possession of the subcontractor. After the work for which it was needed had been fully completed and it was removed from the jobsite, it was not in the possession of, or available for use by the general contractor. The situation here is different than if the equipment had originally been leased to the general contractor and he had retained it after it was no longer needed at the

jobsite or had leased it to someone else or had used it elsewhere without the knowledge or consent of the lessor.

It is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted.

GEORGE H. HAUERKEN
Russ Building
San Francisco, California

Attorney for Jack T. Campbell, etc., and Fidelity and Casualty Company of New York

Of Counsel

THOMAS E. DAVIS
369 Pine Street—Suite 309
San Francisco, California